OCT 29 1974

MICHAEL RODAK, JR., CL

IN THE

SUPREME COURT OF THE UNITED STATES

October Term 1974

No. 74-345

R.J. REYNOLDS TOBACCO COMPANY, et al.,

Petitioners,

v.

AMERICAN PRESIDENT LINES, LTD., et al.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF FOR RESPONDENT AMERICAN EXPORT LINES, INC. IN OPPOSITION

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OPINION BELOW

The opinion of the United States Court of Appeals for the District of Columbia Circuit, printed in Appendix A to the petition, is not yet officially reported.

JURISDICTION

The jurisdictional premises are adequately set forth in the petition.

QUESTION PRESENTED

Can the Federal Maritime Commission obtain jurisdiction under Section 15 of the Shipping Act over an agreement which was filed with it as a discrete acquisition agreement (which would not be within its jurisdiction to approve) by changing the nature of that agreement after the statutory evidentiary hearing has been concluded and by giving the Commission some superficial functions of surveillance over the modified agreement without affording the parties to the administrative proceeding the opportunity to produce evidence and to be heard on the modified agreement and on the issue of whether the Commission's surveillance would be realistic?

STATUTE INVOLVED

The text of Section 15 of the Shipping Act, 1916, 46 U.S.C. 814 is correctly set forth in Appendix E to the petition.

STATEMENT OF THE CASE

This is not a case, as the petition would seem to imply, where the parties filed a proposed "on-going" agreement with the Commission which contemplated "continuous Commission supervision". Quite the contrary was indeed the case. The parties filed a so-called "discrete" or "one-

time" acquisition and merger agreement which in no way contemplated any continuous surveillance or supervision by the Commission. It was not until at the time of rebuttal oral argument before the Commission that a different arrangement was even proposed. No opportunity to be heard at an evidentiary hearing on the agreement that was approved by a bare majority of the Commission was ever afforded, and indeed the Commission denied this respondent's motion to reopen the record for further hearing. These facts may be summarized as follows:

FMC Agreement No. 9827-1, which amended an earlier charter agreement between the parties, involved the acquisition by R. J. Reynolds Tobacco Company (Reynolds) of United States Lines, Inc. (USL) and the merger of USL into Reynolds under circumstances which would permit the 16 USL containerships to be used by Renolds' subsidiary, and USL's major competitor, Sea-Land Service, Inc. (Sea-Land). Sea-Land is the largest containership operator in the world and USL is the second largest. The entire thrust of the proof offered to support this extraordinary acquisition and merger agreement before the FMC was that Sea-Land would be able to utilize the 16 USL containerships more efficiently than USL. The protestants to the agreement directed their evidence to a refutation of these arguments, and the Chief Administrative Law Judge of the FMC recommended that the agreement be disapproved as being in violation of the Shipping Act.

At the oral argument on exceptions to the Initial Decision of the FMC's Chief Administrative Law Judge, the attorney for Sea-Land on rebuttal argument, after all other parties to the proceeding had completed their arguments, presented for the first time a proposal which would involve R. J. Reynolds acquiring USL and maintaining it as a separate company ostensibly competitive with Sea-Land. Under that arrangement, which had never theretofore been

mentioned at any time in any paper filed by either Sea-Land, Reynolds or USL or had been alluded to in the testimony before the Commission, it was suggested that Sea-Land would not use the USL containerships without the approval of the Commission. In other words, the major thrust of the evidence and arguments offered by the proponents of the agreement was in one fell swoop vitiated by the new proposal offered by the Sea-Land attorney at the eleventh hour.

After the oral argument before the Commission, at which the new agreement and new proposal was offered by the Sea-Land attorney, the Commission did issue an order which it entitled, "ORDER REOPENING THE PROCEEDING FOR LIMITED PURPOSES". In that order the Commission did not permit the reopening of the record for the submission of new evidence that would have been subject to cross-examination, but merely provided for the written comments of the parties concerning its notion that it could approve an acquisition agreement whereunder Reynolds would be permitted to acquire all of the stock of USL provided that Reynolds maintained USL as a separate company that would continue to be competitive with Sea-Land. American Export Lines (AEL), the respondent herein, as well as the other parties to the proceeding, submitted memoranda commenting upon the order of the Commission reopening the proceeding for limited purposes. In its memorandum AEL made the following arguments:

(1) The Commission's Order was inconsistent with the requirements of a fair hearing;

(2) There are many factual issues which would have to be explored if AEL had been apprised of the issues which the Commission considered critical;

(3) The Commission's Order violates due process of law;

(4) The most serious problems confronting USL are directly attributable to the merger and charter proceedings;

(5) The assumption that Reynolds would or could maintain USL as a strong competitor of Sea-Land is contrary to the evidence of record and defies common sense; and

(6) The conditions proposed by the Commission are unworkable, illusory and meaningless.

These arguments were not answered by the Commission.

On September 28, 1972, the Commission issued a Press Release announcing that it had decided the proceeding by a 3 to 2 vote of the Commission, which Press Release was superseded by a second Press Release issued on September 29, 1972 concerning the same subject, in which several important corrections were made in the previous Press Release. The Commission's Report was served on February 12, 1973, in which it is noted that three members joined in the so-called "Majority Report" and the two members of the Commission, including the Commission's Chairman, Mrs. Bentley, and Commissioner Ashton Barrett, dissented in a Dissenting Report. One of the Commissioners who joined in the Majority Report, Commissioner James V. Day, found that the Commission does not have any jurisdiction to approve the agreements under Section 15, and he accordingly joined in the Majority Opinion only on the assumption that his conclusion in this respect was incorrect.

After the issuance of the Commission's Report and Order on February 12, 1973, respondent AEL on the next day, February 13, 1973, filed a Motion to Reopen the

Record for the purpose of receiving evidence on the issue which the Commission in its Report had announced as being the critical issue to its decision, which issue had not previously been identified as an issue in the proceeding and had neither been the subject of substantial, reliable or probative evidence, briefing or discussion in the Initial Decision. Without even awaiting the time for replies, the Commission denied AEL's Motion on February 28, 1973, by the same 3 to 2 majority which had joined in the Commission's Report.

ARGUMENT

Petitioners' argument is very simple and entirely contrived and hardly raises issues of any significance that should be reviewed. The decision of the court below is correct. There is no conflict of decisions. Petitioners' argument is that while this Court has held in its recent decision in *Federal Maritime Commission* v. *Seatrain Lines,* 411 U.S. 726, 729, that the FMC has no jurisdiction to approve "merger or acquisition of assets agreements which impose no on-going responsibilities", the door is left open for the FMC to approve a merger or acquisition agreement which involves "on going rights and responsibilities and which, therefore, necessitated continuous Commission supervision." That argument might have some superficial merit if the parties had themselves devised an agreement that would be executory in nature and contemplated on-going rights and responsibilities and involved the continuous regulatory supervision of the FMC. Such was not the case with respect to this agreement where the on-going rights and responsibilities of the parties and the Commission's continuing surveillance functions were concocted as an afterthought in order to create Commission jurisdiction which would not otherwise exist.

The facts are that the petitioners and a bare majority of the members of the FMC were intent upon expanding the Commission's jurisdiction by turning a discrete acquisition and merger agreement into an on-going agreement involving continuing surveillance by the Commission. In this way the Commission's acquisitive appetite for ever expanding jurisdiction would be satisfied, and the most anti-competitive type of agreement involving the world's two largest containership operators would be exempt from the antitrust laws. We need look no further than the opinion of this Court in the *Seatrain* case to determine that the FMC cannot expand its jurisdiction in derogation of the antitrust laws by such a simplistic maneuver.

Obviously, the FMC might have the authority to approve under Section 15 of the Shipping Act an on-going agreement, that had been filed with it as such, over which it could exercise some bona fide and meaningful regulatory supervision. Acquisition and merger agreements are ordinarily discrete one-time transactions, as this agreement was intended to be when filed with the Commission. The Commission cannot bootstrap itself into having jurisdiction to approve merger and acquisition of assets agreements merely by superimposing some continuing functions of surveillance over the agreement which were never intended by the parties nor involved in the statutory hearing.

The attempt to create jurisdiction which would not otherwise exist through the maneuver of a cosmetic alteration to the structure of an application or a controversy is not unprecedented. In such cases, the Federal courts have consistently denied jurisdictional claims based on a superficial restructuring or orchestration of the facts. For example, the Federal courts have refused diversity of citizenship jurisdiction where the necessary diversity was created by assigning a claim to an out-of-state party without divesting the assignor of his interest in the action,

Caribbean Mills, Inc. v. *Kramer,* 392, F.2d 387 (5th Cir. 1968) affirmed 392 U.S. 823 (1969); by appointing a nominal party such as a guardian for the sole purpose of creating a diversity situation, *McSparran* v. *Weist,* 402 F.2d 867 (3rd Cir. 1968), cert denied 395 U.S. 903 (1969); and by a corporation transferring its claim to a subsidiary incorporated in another state, *Miller & Lux* v. *East Side Canal & Irrigation Co.,* 211 U.S. 293 (1908).

Certainly, it is well settled that the Commission is required to hold a hearing on agreements which are filed with it for approval under Section 15, *FMB* v. *Isbrandtsen,* 356 U.S. 481 (1958); *Marine Space Enclosures, Inc.* v. *FMC,* 420 F.2d 577, 137 U.S. APP. D.C. 9 (1969), unless such agreements are (as was certainly not the case here) routine or *de minimus, Volkswagenwerk* v. *FMC,* 390 U.S. 261, 277 (1968). Nor could there be any reasonable disagreement that the Commission cannot approve such a restrictive agreement, which would otherwise be in violation of the antitrust laws, unless there is substantial evidence that it is required to fill some transportation need, *FMC* v. *Svenska Amerika Linien,* 390 U.S. 238 (1968). In this case neither of these requirements has been met. The agreement that was approved by the Commission was not the subject of the hearing and there was consequently not only no "substantial evidence" introduced in the administrative hearing to support such an agreement — *there was no evidence whatsoever.*

Although the Commission must have some scope of authority to impose conditions to its approval of an agreement within its jurisdiction, it cannot through such a procedure consider or approve an agreement that is not formally before it and concerning which the opportunity for a hearing on all the important elements in the agreement was not afforded. The ability of the Commission to modify an agreement and to destroy the right of the parties

to be heard on the modified agreement which the Commission undertakes to approve must be limited by considerations of due process and the requirements of a fair hearing. When either the Commission or the parties substantially modify an agreement, it is, of course, tantamount to the filing of a new agreement with the Commission. If such a modified agreement raises issues which were not involved or considered at the statutory hearing, the parties must be given the opportunity to be heard upon them. If the rule were otherwise, an agreement could be substantially rewritten after the hearing had ended (as was the case here) and the right of protestants to be heard on the agreement would be meaningless.

The law is clear that an essential element of due process is that parties must have a chance to litigate the issues upon which a case is decided. In *Anglo-Canadian Shipping Co.* v. *United States,* 264 F.2d 405 (9th Cir. 1959), for example, the court reversed the former Federal Maritime Board on the independent but sufficient ground that,

> "The complaint on which the petitioners were summoned to appear for hearing contained no allegation that respondents were enforcing an interpretation of their agreement which had not been filed with or approved by the Board. (Footnote omitted.) The intervenor's petition also fails to supply this deficit. Had the respondents been served with a complaint (a) alleging that the Conference had made a new interpretation of its agreement; (b) setting out what that interpretation was; (c) alleging that this differed from the agreement as approved; and (d) that this new interpretation or modification operated to the detriment of the commerce of the United States, the respondents would have had a fair chance to produce evidence in support of their contrary contention."

This basic principle applies in statutory hearings before all administrative agencies. *NLRB* v. *Bradley Washfountain Co.,* 192 F.2d 144 (7th Cir. 1915); *S.S. Kresge Co.* v.

NLRB, 416 F.2d 1225, 1235 (6th Cir. 1969); see also *Consolidated Edison Co.* v. *NLRB*, 305 U.S. 197, 234-235 (1938). See generally *Rodale Press* v. *FTC*, 132 U.S. App. D.C. 317, 407, F.2d 1252 (1968); *Pan American Airways* v. *CAB*, 84 U.S. App. D.C. 96, 171 F.2d 139 (1948); *Tadano* v. *Manney*, 160 F.2d 665 (9th Cir. 1947); *Deep South Broadcasting Co.* v. *FCC*, 120 U.S. App. D.C. 365, 347 F.2d 459, 464-65, (1965).

The decision of the Court of Appeals holding that the FMC has no jurisdiction to approve the instant acquisition and merger agreement is obviously correct and is in conformity with the holding of this Court in the *Seatrain* case. An on-going agreement within the purview of Section 15 of the Shipping Act must be one that is presented to the FMC as such where the on-going nature of the agreement has some business reason and where the Commission's regulatory surveillance would serve a valid regulatory purpose. To accomplish these purposes and to achieve the consequent antitrust immunity which would result from the Commission's approval of the agreement, it is clear that there must be some reasonable way to review the Commission's actions. In this case, where the FMC has approved an agreement materially different than the agreement which was filed with it by the parties and which was the subject of the statutory hearing, there is no possible way that this Court could review the FMC's consideration of the antitrust implications of the agreement which it has approved because that agreement was not the agreement on which the hearing was held.

CONCLUSION

For the reasons set forth, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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